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Finders Weepers

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Nothing better demonstrates the idiosyncrasies of the law of finders than the testimony quoted by the court in its recent decision in *Lindenstadt v Staff Builders, Inc.* (1997) 55 CA4th 882, 64 CR2d 484. Lindenstadt claimed finder's fees for several deals he had put together based on a finder's fee agreement he had with Staff Builders. He submitted the claims to arbitration. Staff Builders argued that Lindenstadt, who did not have a real estate license, was barred from recovering any fees because California law prohibits an unlicensed person from collecting any compensation for transactions requiring a real estate license. Lindenstadt, however, was relying on the "finder's exception" to the real estate licensing law. That rule allows compensation to a person who simply finds and introduces the parties, but who does not engage in any negotiations to close the deal; the finder instead leaves the negotiations to the parties themselves.

On Lindenstadt's first claim, which concerned a deal involving Comprehensive Services, the appellate court quoted the arbitrator as follows:

"Lindenstadt testified that he obtained Comprehensive's financial reports to forward to Staff Builders and also 'facilitated meetings, kept discussions on track.' Lindenstadt's testimony as to his activities was vague and conclusory and the Arbitrator gave it little credence. . . . Staff Builders' [president] Steve Savitsky testified that Lindenstadt had no involvement in negotiating terms of the Comprehensive Services deal. The Arbitrator makes the factual finding that Mr. Lindenstadt's activities were as testified by Mr. Savitsky."

Thus, the effect of Lindenstadt's lack of credibility was that the arbitrator concluded that his actions "included no prohibited 'broker' activities precluding enforcement of the contract. Therefore the fee agreement relating to Comprehensive Services is enforceable."

The same thing happened on a deal involving Homelife Nursing, Inc. The appellate court again quoted the arbitrator:

"Mr. Lindenstadt testified that he spoke to Mr. Gleason [the potential seller] at least 5–10 times over the course of 1993 to see how things were progressing and also discussed Homelife with Staff Builders several times asking whether they were pursuing the opportunity. . . . Mr. Gleason contradicted Mr. Lindenstadt, stating that he had never spoken to Lindenstadt and would recall 5–10 conversations if they had occurred. Mr. Gleason also testified that such conversations could not have occurred as he would not discuss acquisition matters with anyone, had no authority to do so, and would forward such calls to Homelife CEO Ed Schrum."

The arbitrator again disbelieved Lindenstadt's testimony, stating: "The Arbitrator believed Mr. Gleason's and Schrum's testimony as to the nonexistence of these conversations as more credible than Mr. Lindenstadt's." The result of the arbitrator's rejection of Lindenstadt's testimony, however, was the same as in the Comprehensive deal: "Therefore, there is no factual basis for finding that Mr. Lindenstadt engaged in prohibited brokering activities. The contract with respect to Homelife is enforceable."

Lindenstadt ought to thank his lucky stars that he was such a poor witness. Had the arbitrator believed him, she would have had to conclude that he had acted like a broker rather than a finder and thus deny him—because he held no real estate broker's license—his commission.

Shooting Yourself in the Foot

I can understand why Lindenstadt, being neither a lawyer nor a broker, would be motivated to testify as he did: It is a natural human sentiment to believe, when you are claiming compensation, that you ought to show how hard you worked. But where was his lawyer—or the defendant's lawyers—when he was putting on his case? Both sides said on the stand exactly the opposite of what was in their best interests.

As noted above, Lindenstadt could recover a finder's fee only if his activities were limited to finding; to do more would be to act like a real estate broker but without a license. As the court stated (55 CA4th at 894):

[T]he purpose of the broker's licensing statute—the promotion of competency and trust—is not served by denying Lindenstadt a finder's fee on transactions where he merely introduced the principals to one another, and Staff Builders thereafter negotiated the acquisition. The goal of the licensing law is adequately served by denying Lindenstadt any compensation on those transactions where he crossed the line from finder to broker.

Under a rule like this, one would expect to see Lindenstadt declaring how *little* he did, and the defendants praising Lindenstadt for his extensive involvement in the deal.

It is an odd rule which motivates both sides to testify against their human intuitions. The supreme court has characterized it as a seeming anomaly, but has justified it as the unavoidable result of wanting, on the one hand, to require licensing for people who negotiate real estate and business deals while, on the other hand, wanting to enforce promises to pay persons who locate buyers or sellers for others.

Indeed, there seems to be no universal common sense of finders' rules. In California, we do not require the finder to be licensed, but we do require the finder to get a written agreement. See *Tenzer v Superscope, Inc.* (1985) 39 C3d 18, 216 CR 130. Other states interpret their licensing statutes as covering finders, although some, at the same time, do not require a writing to enforce the fee agreement, which is just the opposite of what we do. See, *e.g.*, *Scott/Hubbard Co. v Sika Chem. Corp.* (ND Ill 1988) 694 F Supp 1311. In New York, finders' agreements have to be written, but brokers' agreements do not, whereas California, until a few years ago, was just the opposite.

Protecting Your Finder

Whether the worry is the licensing statute or the statute of frauds, finders have to watch themselves. A written agreement should be executed in advance (as in *Lindenstadt*), and if you are the finder's attorney you ought to ensure that the agreement contains language limiting the activities the finder should be expected to undertake. The agreement probably also should provide that the finder will not in any way participate in the negotiations between the parties.

Even if you are lucky enough to get all those nice clauses in the contract, however, the parties may forget about them entirely once a deal starts to materialize. Consider this paragraph from a 1990 District of Columbia opinion:

After Kaempfer rejected Yazbeck's initial offer for the Hotel and office building, Kassatly [the finder] personally contacted Kaempfer about the deal on Yazbeck's behalf. KASSATLY: He [Yazbeck] says, "Kassatly, I want you to go to see Kaempfer immediately and tell him that I don't agree with this and we still need to negotiate and I still am interested in buying the hotel." QUESTION: Did you do that? ANSWER: Yes absolutely.

The court's conclusion was that "[p]laintiff's deposition testimony demonstrates that plaintiff did much more than simply introduce the parties." *Kassatly v Yazbeck* (DDC 1990) 734 F Supp 13.

Finders are legally expected merely to introduce the parties but, because they get no commission unless and until a deal is consummated, can we really expect them to take no interest in what happens after the introduction or to reject requests for help from the principals? At such a preliminary stage, to honor the legal imperative and stay out of the negotiations is probably to blow the deal. We may give that advice, but we should not be surprised if the client does not follow it. Isn't there anything more sensible to suggest?

Minimizing the Extra Effort

An old case, *Freeman v Jergins* (1954) 125 CA2d 536, 271 P2d 210, might be helpful. In that case the finder went too far, but still won. The court stated (125 CA2d at 546):

[P]laintiff had done everything that he was required to do when he brought about the introduction of Lee. That constituted performance on his part, and it is that performance and nothing else for which he seeks compensation. If he did more than that it was not in performance of anything that he had undertaken to do or was required to do in order to earn his compensation. He is not suing for compensation earned as a result of his efforts in effecting a sale, but claims it solely on the basis of his introduction of Lee and the results of the efforts of Smith-Barney. Even if he had engaged in some activity that was not required of him, and which was wholly apart from the full performance of his agreement, this would not be a defense against liability of the defendants to him for the full performance of a valid agreement in a lawful manner.

If the *Freeman* logic really works, it suggests how attorneys can be helpful. The original agreement can provide that any services over and above the initial introduction are not part of the finder's basic contractual obligations and are gratuitous rather than for compensation. Even if that language is not in the contract, we can draft letters for the finder to send reciting that he or she has been asked to (and will) perform some additional services, but that these should be treated as extracontractual courtesies. The letter could also state that the services are not to be deemed to constitute "negotiations," because all parties appreciate that the finder is not licensed and could not lawfully render such services even if desired to do so.

By the way, you also have the same problems when you are acting as a finder rather than as an attorney for the finder. Your state bar license is no substitute for a broker's license, so you can't claim a broker's commission if you go beyond strict finding. See *Provisor v Haas Realty, Inc.* (1967) 256 CA2d 850, 64 CR 509. Holding a broker's license in addition to a bar card will let you collect *either* an attorney fee *or* a broker's commission; trying to get both in the same deal can cause serious problems, because you must comply with both sets of (often inconsistent) professional standards at the same time. See California State Bar Formal Opinion No. 82–69.